No. 17-1299

In the Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF PROFESSORS WILLIAM BAUDE AND STEPHEN E. SACHS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

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SUMMARY OF ARGUMENT

This case presents the question whether to overrule *Nevada* v. *Hall*, 440 U.S. 410 (1979). That question requires careful attention to the legal status of sovereign immunity and to the Constitution's effect on it, which neither *Hall* nor either party has quite right. The Founders did not silently constitutionalize a common-law immunity, *contra* Pet. Br. 35–36, but neither did they leave each State wholly free to hale other States before its courts, *contra* Br. in Opp. (BIO) 13–14. While *Hall*'s holding was mostly right, other statements in *Hall* are likely quite wrong—yet this case is a poor vehicle for reconsidering them.

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[1]All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to this brief, and the views expressed here are solely those of the *amici curiae*.) No other person or entity, other than the *amici curiae*, has made a monetary contribution intended to fund the preparation or submission of this brief.

1. *Hall* correctly held that States lack a *constitutional* immunity in sister-state courts. The Founders viewed each State as immune from such suits under the common law and the law of nations. Before the Constitution's enactment, this was plainly not a constitutional right, and nothing in the Constitution changed that. Thus, *Hall* properly rejected the argument that there is a "federal rule of law implicit in the Constitution that requires all of the states to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418.

A plain reading of the Constitution's text reveals no affirmative guarantee of sister-state immunity. Unless otherwise specified "in the plan of the convention," The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), the Constitution takes the States' sovereign rights as it finds them. The Founders left the rules of sister-state immunity precisely as they were: as ordinary rules of common law and the law of nations, to be enforced through ordinary channels. The Franchise Tax Board treats the Founders' broad support for sovereign immunity as evidence of its constitutional stature. Pet. Br. 23–28. But it is a "fundamental mistake" to "quote prominent Framers without investigating the legal basis for their conclusions." Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1653 (2002).

In essence, the Board argues that the issue is of constitutional significance, so it must be addressed somewhere in the Constitution—and that the Court has wandered from the text before, so it may as well do

so here. Pet. Br. 18–20, 34–39. That sells this Court's decisions short. The "fundamental postulates" of immunity recognized by this Court, *Alden* v. *Maine*, 527 U.S. 706, 729 (1999), are bona fide rules of common law, "backdrop" legal principles that the Constitution indirectly protects from federal abrogation. See generally Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017); Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1816–19, 1868–75 (2012). Article III simply declines to abrogate certain State immunities from suit, see *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Monaco* v. *Mississippi*, 292 U.S. 313 (1934), and Article I likewise declines to grant Congress an enumerated power to do so, see *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996); *Alden*, 527 U.S. 706. Neither these refusals to grant additional powers to the Federal Government, nor the Eleventh Amendment's further restriction of the federal judicial power, impose any constitutional restraints on *State* governments—which retain every power "not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X.

2. *Hall* went too far, however, in denying that "the Constitution places *any* limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State," 440 U.S. at 421 (emphasis added), and in reducing sister-state immunity to a "matter of comity," *id.* at 425. In particular, *Hall* was likely wrong to assume that a State's abrogation of immunity in its own courts could be projected outward so as to bind other state and federal courts.

Even without a direct guarantee of sister-state immunity, the Constitution may well offer substantial indirect protection rooted in the law of judgments. Whatever a State's power to prescribe rules for its own courts, it cannot force *other* courts to take notice of "a jurisdiction which, according to the law of nations, [the] sovereign could not confer." *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 276–77 (1808). Early federal and state courts routinely refused full faith and credit to state judgments that exceeded the jurisdictional limits imposed by the law of nations and the common law. These same principles would provide ample protection for States today, shielding them from suit in sister-state courts without inventing a novel constitutional rule.

3. In an appropriate case, these principles might justify revisiting and narrowing portions of *Hall*. Yet this case is a poor vehicle for doing so.

A State threatened by suit in a sister-state court has many options, ranging from default to a federal action against the plaintiff to an original-jurisdiction action against the offending State. Each of these options might allow a federal court, including this Court, to enforce California's common-law immunity from suit.

The Board has done none of these things. Instead, it appeared in Nevada's courts, lost its state-court litigation, and then sought review in this Court on federal-question grounds. Yet sister-state immunity is not a rule of federal law that can support federal-question jurisdiction. And the Board's appearance may have waived its right to shield itself from the Nevada judgment under other heads of jurisdiction.

More urgently, on a faithful reading of the Eleventh Amendment's text, this Court's own subject-matter jurisdiction is in serious doubt. Gilbert Hyatt's suit against the Board is one "commenced or prosecuted against one of the United States by Citizens of another State"—to which "[t]he Judicial power of the United States," including the power vested in this Court, "shall not be construed to extend." U.S. Const. amend. XI. Though the Court has announced exceptions to the Eleventh Amendment in similar cases, these cases did not adequately address the Amendment's text and history. This issue is jurisdictional, and it would need to be reexamined *sua sponte* before the Court could reach the merits.

Because the case has been improperly framed by the parties and cannot be resolved properly without further briefing, the Court should dismiss the writ as improvidently granted. Alternatively, it should dismiss for lack of jurisdiction—or, if satisfied of its jurisdiction, should affirm.

ARGUMENT

I. The Constitution does not entrench sister-state immunity as a constitutional rule.

Hall rejected the argument that sister-state immunity was a "federal rule of law implicit in the Constitution." 440 U.S. at 418. It was correct to do so, and that part of *Hall* should not be disturbed.

This is not to deny the legitimacy and importance of sovereign immunity. This Court has properly recognized the States' "immunity from suit [as] a fundamental aspect of the sovereignty which [they] enjoyed before the ratification of the Constitution."

Alden, 527 U.S. at 713. Before the Constitution, however, sovereign immunity was not a rule of constitutional law, but rather of the common law and "the general law of nations" that protected the States as separate sovereigns. Nelson, *supra*, at 1574.

We are aware of no contemporaneous evidence that Ratification somehow transformed this unwritten immunity into a constitutional rule. Instead, the only debate at the Founding concerned whether Article III would empower federal courts to disregard the States' preexisting immunities. Alexander Hamilton, James Madison, John Marshall, and James Iredell all believed the Constitution did not affect the States' immunity to individual suits, and the Eleventh Amendment then "cut off" the only portion of Article III that even arguably spoke to the question. *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (argument of Attorney General Charles Lee). The Constitution left sister-state immunity alone, neither abrogating it nor transforming it into a rule of constitutional law.

While the States' immunities from suit do indeed extend more broadly than does the Eleventh Amendment, they do not rest on mysterious penumbras and emanations from the federal structure, nor on the unenacted hopes and dreams of the Founding generation, cf. *Williamson* v. *Mazda Motor of Am., Inc.*, 562 U.S. 323, 343 (2011) (Thomas, J., concurring in judgment). Instead, they rest on specific rules of law that the Constitution left alone. Those rules of law were indirectly preserved by the Constitution, but not constitutionalized; they persist through the *absence* of federal power to override them, and not through any affirmative constitutional guarantee.

A. Before the Constitution, sovereign immunity was a doctrine of common law and the law of nations.

Sovereign immunity was not invented by the Constitution. Long before the Philadelphia Convention, the thirteen original States were not amenable to each other's jurisdiction, and they could not be haled into each other's courts. The common law and the law of nations afforded them immunity from what we would now call personal jurisdiction: as sovereigns, they could not be subjected to compulsory process, and they could only be sued by consent. See Nelson, *supra*, at 1565, 1568, 1574; Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 559, 583 (1994); cf. 4 William Blackstone, Commentaries on the Laws of England *67 (describing the law of nations as part of the common law).

This traditional immunity had no constitutional source and needed none. In 1781, a Philadelphia plaintiff sought to compel Virginia's appearance by attaching its goods. *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 n. (Pa. C.P. Phila. County 1781). At the time, the newly enacted Articles of Confederation had already imposed full faith and credit obligations on the States, deprived them of the rights to make treaties or to engage in war, and created a tribunal to hear "all disputes and differences *** between two or more States." Articles of Confederation of 1781 arts. IV, VI, IX. Yet none of this transformed the States' basic relationship as mutual sovereigns, nor did the Articles' structure or values determine the decision in *Nathan*.

Instead, both parties in *Nathan* understood the case to turn directly on the law of nations. Pennsylvania's

attorney general argued that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void," meaning that the court "had no jurisdiction over Virginia." *Nathan*, 1 U.S. at 78 n. (argument of counsel); accord Letter from Joseph Reed to Virginia Delegates (July 10, 1781), in 3 The Papers of James Madison: Congressional Series 187, 187 n.2 (William T. Hutchinson et al. eds., 1963). The only significance of the Articles was that they did nothing—leaving each State's sovereignty intact, "with every power, jurisdiction, and right, not expressly given up." *Nathan*, 1 U.S. at 78 n. (argument of counsel) (paraphrasing Articles of Confederation art. II). The plaintiff's counsel in *Nathan* did likewise, arguing that the law of nations afforded only a limited immunity. *Id.* at 79 n. The court agreed with the attorney general and upheld the broader immunity, as did another court considering a similar case the same year. *Id.* at 80 n.; *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9697).

B. Ratification did not alter the legal status of sovereign immunity.

Like the Articles, the Constitution largely left the States' sovereign immunity alone. The Board portrays Ratification as an agreement to constitutionalize the rules of sovereign immunity. Pet. Br. 35. But that is wrong as a matter of both text and history.

As to text, the Board points to such features as the Full Faith and Credit Clause, the limits on state treaty and war powers, and the creation of independent federal tribunals to argue that Ratification transformed the nature of sovereign immunity. Pet. Br. 31–32. But

these features were all present in the Articles, and so they marked no transformation.

As to history, the Board points to the near-universal conviction at the Founding that States were not amenable to suit in sister-state courts. Pet. Br. 21–28. But the Founders spoke of these immunities as common-law rules, not constitutional ones. The Constitution's supporters assumed that "background principles of general law would continue to protect states from being haled into court without their consent"; the only relevant question was whether Article III would *override* these principles with new constitutional rules. Nelson, *supra*, at 1568. For some suits against States, such as those filed by a sister State or the Federal Government, Article III was indeed understood to waive jurisdictional immunities. See, *e.g.*, *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838); cf. *United States* v. *Mississippi*, 380 U.S. 128, 140–41 (1965). At the same time, prominent Founders denied that the Constitution reflected similar consent to individual suits, assuring skeptics that this common-law immunity would survive Ratification. They did not argue that the Constitution itself ratified this immunity, nor did they treat sovereign immunity generally as a new rule of constitutional law.

Hamilton, for example, rejected the argument that the state-diversity clauses could be interpreted as abrogating sovereign immunity. He argued that it was "inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*," and that the power to compel sovereigns to appear could not be "ascribe[d] to the federal courts, by

mere implication." The Federalist No. 81, *supra*, at 548–49. Because this immunity was not surrendered "in the plan of the convention," he argued, "it will remain with the states." *Id.* at 549. This argument was entirely negative: it articulated the law by highlighting what the Constitution had *not* done to change it.

Madison likewise focused on what the Constitution would leave alone. He drew an analogy between sovereign immunity and other common-law doctrines, such as coverture and alienage, that had not been abrogated by the heads of federal jurisdiction. As he put it, "[a] *femme covert* may be a citizen of another state, but cannot be a party in this court"; and an "alien enemy," though diverse from "a citizen of this state, *** cannot bring suit at all." 3 The Debates in the Several State Conventions 533 (Jonathan Elliott ed., Phila., J.B. Lippincott Co. 2d ed. 1891) (Elliott's Debates). Madison's point was not that Article III constitutionalized the law of coverture and alienage, transforming them into permanent limits on federal jurisdiction. Rather, the Constitution simply took these common-law capacity rules as it found them, as separate doctrines (like preclusion or estoppel) under which an otherwise well-pleaded suit might fail. Because sovereign immunity was another such doctrine, the state-diversity provision could in practice "have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." *Id.*; see also Baude, *supra*, at 9–10; Sachs, *Backdrops*, *supra*, at 1870–71; accord 3 Elliott's Debates, *supra*, at 555–57 (John Marshall).

James Iredell's famous dissent in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), adopted the same reasoning. Though he concentrated on statutory questions, Iredell also contended that the States' preexisting immunities had been left unaffected: "[E]very word in the Constitution may have its full effect without involving this consequence, and *** nothing but express words, or an insurmountable implication *** would authorise the deduction of so high a power." *Id.* at 450. Iredell understood the "Conventional Law of Nations," *id.* at 449, to preserve the States' sovereign rights "[i]n every instance where authority has *not* been so surrendered," James Iredell's Observations on State Suability (Feb. 11–14, 1792), *in* 5 The Documentary History of the Supreme Court of the United States, 1789–1800, at 76, 82 (Maeva Marcus ed., 1994) (DHSC). And when the Eleventh Amendment constitutionalized some of the States' immunities, it eliminated the only portion of Article III that could plausibly have justified a contrary construction—instructing that "[t]he Judicial power of the United States shall not be construed to extend" to private state-diversity suits. U.S. Const. amend. XI.

The Board repeatedly confuses the Founders' choice *not to abrogate* sovereign immunity with a decision *to entrench* it, transforming the traditional common-law immunities into new rules of constitutional law. See Pet. Br. 3, 20, 23, 36. But no clause actually works such a transformation, and none was needed. The Constitution simply leaves those rules alone.

C. The Constitution indirectly preserves the States' common-law immunities by declining to authorize their abrogation.

The only provision of the Constitution that does address sovereign immunity is the Eleventh Amendment. Since that Amendment's adoption, the Court has applied immunity doctrines in many contexts that cannot be explained by reference to its terms. The Amendment applies only to suits where diversity is present, and not to federal-question suits by a State's own citizens—as in *Hans*, 134 U.S. 1, or *Seminole Tribe*, 517 U.S. 44. And it applies only to federal courts, and not to state courts—as in *Alden*, 527 U.S. 706, or here.

The Court's cases are correct, but the Board is wrong about why. The Board celebrates these cases as recognizing immunity "beyond the constitutional text," Pet. Br. 19, and it criticizes "undue focus on the constitutional text" in favor of broader claims about "the federal structure of the Union." Pet. Br. 18, 35. Yet the Founders and the Court were more faithful to the text than the Board credits. Though the common-law rules of immunity were not directly entrenched, they are indirectly protected by features of the written Constitution. That text creates a government of limited powers, safeguarding state sovereign immunity from Congress simply by granting no power to upset it. As a result, common-law immunity can explain modern doctrine without any makeshift structural supports.

Sometimes the Constitution's text forbids certain changes to a nonconstitutional rule. The classic example is the law of sovereign borders. The Constitution says nothing about where the States begin

and end, how they are affected by accretion and avulsion, and so on. It simply declines to "Prejudice" their territorial claims, U.S. Const. art. IV, §3, cl. 2, forbids Congress from redrawing state lines, *id.* cl. 1, and establishes federal tribunals to resolve territorial disputes, *id.* art. III, §2, cl. 1—which they do by reference to "ordinary background law," *New Jersey* v. *New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring); see Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1255–69 (2017). "Backdrop" rules like these are not part of the Constitution, but they resemble constitutional rules in effect, as bona fide constitutional rules serve to keep them in force.

The traditional rules of sovereign immunity were nonconstitutional rules of this kind, which were sometimes kept in force by rules of constitutional law. For example, Justice Iredell in *Chisholm* understood Georgia's common-law immunity to survive Article III's specific state-diversity provision. That common-law immunity is not a distinct requirement of Article III, but a common-law rule that Article III declines to abrogate and allows to operate of its own force. The immunity likewise survives Article III's other, more generic heads of jurisdiction—thereby explaining the holding in *Hans*, which refused to read the grant of federal-question jurisdiction as authorizing "suits and actions unknown to the law," 134 U.S. at 15. These suits and actions remain unauthorized, unless the States' common-law immunity can be abrogated by other means. See Baude, *supra*, at 9–10.

For similar reasons, a generic Article I power to "regulate Commerce *** with the Indian Tribes," U.S. Const. art. I, §8, cl. 3, need not confer a power to

abrogate a State's immunity—thereby explaining the holding in *Seminole Tribe*, 517 U.S. at 70 & n.13. Although Congress may pass laws "necessary and proper" to carrying other powers into execution, U.S. Const. art. I, §8, cl. 18, abrogating the States' sovereign rights may well be a "great substantive and independent power, which cannot be implied as incidental to other powers," and which must be enumerated explicitly if it is to be conferred at all. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819); see Baude, *supra*, at 15; Nelson, *supra*, at 1640. If Congress has no Article I abrogation power, then the preexisting common-law rules of immunity remain in force by default.

And if Congress generally lacks power to abrogate a State's immunity in federal court, then *a fortiori* it lacks power to do so in *state* court, where its Article I powers are no greater—thereby explaining the holding in *Alden*, 527 U.S. at 741. The substance of the immunity is inherited "from the common-law tradition," but the common-law rules are effectively "protected by the Constitution," and Congress's limited power to abrogate them "exists today by constitutional design." *Id.* at 733–34; see Baude, *supra*, at 16–17.

An enumerated power to abrogate might be available on some topics but not others. Perhaps abrogation is "appropriate" for enforcing the Fourteenth Amendment, though not necessary and proper to regulating Indian commerce. Compare *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe*, 517 U.S. at 59, 70. In any case, this is "ultimately a question of enumerated powers," Baude, *supra*, at 21—which turns on the details of each

particular power, and not on abstract visions of "federal structure," Pet. Br. 35.

The Board's structural argument in this case, however, reverses the ordinary presumptions of constitutional interpretation. The Board suggests that the States necessarily "relinquished jurisdiction" whenever "adjudication in state court would be inconsistent with the federal structure." Pet. Br. 35. But under our Constitution, "[t]he powers delegated *** to the Federal Government, are few and defined," while "[t]hose which are to remain in the State Governments are numerous and indefinite." The Federalist No. 45 (James Madison), *supra*, at 313. It is dangerous to read Founding-era references to structural limits on *federal* judicial power as imposing similar limits on the power of the state judiciaries.

The enumerated-powers theory that supports *Seminole Tribe* and *Alden* does not extend to the States, which are "bound by neither Article I, nor Article III, nor the Eleventh Amendment." Baude, *supra*, at 25. Rather, the States retain every power with which they entered the Union—including any power to abrogate another State's immunity within their own courts—that has not been "delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. That is why *Hall* pointed to "the Tenth Amendment's reminder," requiring "caution *** before concluding that unstated limitations on state power were intended by the Framers." 440 U.S. at 425. And that is also why *Alden* quoted *Hall* and emphasized that the Constitution "treats the powers of the States differently from the powers of the Federal Government." 527 U.S. at 739.

Those conclusions should not be disturbed, because they are correct.

II. The Constitution may enforce sister-state immunity indirectly, by refusing to guarantee the recognition of judgments.

At first glance, the rule in *Hall* might seem absurd: surely the Constitution does not leave state courts free to hear any lawsuit they wish against other States. That intuition is understandable, but misdirected. While *Hall* was correct to reject an unenumerated right of sovereign immunity, it was likely quite wrong to reduce sister-state immunity to a "matter of comity," 440 U.S. at 425, or to deny that "the Constitution places *any* limit" on sister-state jurisdiction, *id.* at 421 (emphasis added). Our federal system may well limit a State's power to abrogate sister-state immunity, through the lack of binding effect such judgments would have in other courts.

Because sovereign immunity is a rule of common law and the law of nations, a State can abrogate it within its own courts, just as it can abrogate the common-law rules of coverture, burglary, or respondeat superior. See *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 143 (1812); see also Baude, *supra*, at 27–28. But the State's power may well end there. As nearly a century of history suggests, the original Constitution did not force state or federal courts to respect the judgment of a court which lacked power over the defendant under traditional jurisdictional principles. Sister-state immunity was just such a principle. Thus, a State which tries to abrogate that immunity may find its judgments without effect in other American courts.

If so, the Constitution allows States to resist improper sister-state jurisdiction through the same mechanisms it long used to address improper state-court jurisdiction generally. The Founders did not necessarily leave sister-state immunity out of the constitutional text because it was "not a matter of concern," *Hall*, 440 U.S. at 418–19, or because "it was too obvious to deserve mention," *id.* at 431 (Blackmun, J., dissenting). Instead, the topic may simply have needed no attention, because adequate off-the-shelf protections were already in place.

A. The law of nations allowed sovereigns to abrogate others' immunities only within their own courts.

Among nations, sovereign immunity traditionally depended on the forum's consent, in that the local sovereign could always instruct local courts not to respect it. As Chief Justice Marshall explained in *The Schooner Exchange*, "all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory." 11 U.S. at 143. In the eyes of the law of nations, a sovereign always had the power, if not always the right, to "exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world." *Id.* at 137. Similarly, as Justice Story noted in *The Santissima Trinidad*, a sovereign could always "withdraw[] its consent to allowing foreign warships to enter, "without just offence"; but it still could not rightfully compel "a foreign sovereign *** to appear in our Courts, or [to] be made liable to their judgment, so long as he remains in his own dominions." 20 U.S. (7 Wheat.) 283, 353 (1822).

By the same token, sovereigns had no power on their own to make their judgments against other sovereigns effective in other courts. In the international context, such judgments might be recognized only as a matter of comity. See generally *Hilton* v. *Guyot*, 159 U.S. 113 (1895). And one reason for refusing recognition might be that the rendering court had violated international law: "[I]f it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts." *Rose*, 8 U.S. at 276–77; accord *Bradstreet* v. *Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (Story, Circuit Justice, CCD Mass. 1839) (No. 1793); Joseph Story, Commentaries on the Conflict of Laws §586, at 492 (Boston, Hilliard, Gray & Co. 1834).

That may be why, in *Nathan*, Pennsylvania's attorney general described the offending process as "void." 1 U.S. at 78 n. In the eyes of the law of nations, "Pennsylvania lacked the power, by its own unilateral legislative or constitutional act, to abrogate Virginia's immunity." Pfander, *supra*, at 582 n.102. Even today, "foreign sovereign immunity is a matter of grace and comity on the part of the United States," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); but if the United States departs from accepted international practice, it cannot guarantee that its judgments will continue to be recognized abroad.

B. States may owe no faith and credit to judgments that violate sister-state immunity.

Ordinarily, a State must recognize the judgment of another State's court under the Full Faith and Credit Clause and its implementing statute. U.S. Const. art. IV, §1; 28 U.S.C. §1738 (2012). *Hall* therefore assumed that a single State's abrogation of immunity would automatically be effective nationwide. See 440 U.S. at 421.[2] This assumption may well have been incorrect, and it could be revisited in an appropriate case.

As *Hall* noted, effect is only given to judgments issued with "jurisdiction over the parties." *Id.* Yet the core of the Founding-era immunity doctrine was that States were *not* amenable to jurisdiction without their consent. For nearly a century after the Founding, courts enforced traditional limits on jurisdiction by refusing recognition to improper judgments, even if they were considered lawful where they were rendered. A State that abrogated sister-state immunity would have found the resulting judgments unrecognized in other courts.

Beginning under the Articles of Confederation—which also contained a full faith and credit clause—courts expected "competent jurisdiction" under "common law rules" before giving a judgment "due faith and credit" under "[t]he act of confederation *** and the law of nations." *Jenkins* v. *Putnam*, 1 S.C.L. (1 Bay)

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[2] This full-faith-and-credit issue is distinct from that addressed in *Franchise Tax Board* v. *Hyatt*, 136 S. Ct. 1277 (2016), namely whether a State violates the Clause when prescribing the law for its own courts.

8, 10 (1784) (*per curiam*); see Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1221–26 (2009). This practice continued under the Constitution. See, *e.g.*, *M'Elmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326–27 (1839); *Flower* v. *Parker*, 9 F. Cas. 323, 324–25 (Story, Circuit Justice, CCD Mass. 1823) (No. 4891); *Bissell* v. *Briggs*, 9 Mass. (9 Tyng) 462, 467 (1813) (opinion of Parsons, C.J.). Courts generally agreed that "a state judgment could be challenged in other courts for violating general-law rules of personal jurisdiction," for the Clause and its implementing statute only applied "to valid judgments that respected the prevailing rules." Sachs, Pennoyer *Was Right*, *supra*, at 1276; see *id.* at 1269–87.

Even if a judgment had been properly rendered under the forum State's law, it would have no effect in other courts unless it complied with the traditional limits. See, *e.g.*, *Picquet* v. *Swan*, 19 F. Cas. 609, 612 (Story, Circuit Justice, CCD Mass. 1828) (No. 11,134); *Bartlet* v. *Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.). In *D'Arcy* v. *Ketchum*, this Court squarely held that the Constitution and Congress had left intact the "the international law as it existed among the States in 1790"—concluding that a state judgment, though authorized by local statute, would have "force and effect beyond the local jurisdiction" only if it complied with the "well-established rules of international law, regulating governments foreign to each other." 52 U.S. (11 How.) 165, 174, 176 (1851); see also *Hall* v. *Lanning*, 91 U.S. 160, 168–69 (1875).

Though the scope of state-court jurisdiction is surely fundamental to our federal structure, the courts understood these cases to turn on questions of common

law and the law of nations, and not of constitutional law. For most litigants, that changed upon the adoption of the Fourteenth Amendment, as a state judgment asserting jurisdiction could be invalidated on due process grounds. *Pennoyer* v. *Neff*, 95 U.S. 714, 732–33 (1878); Sachs, Pennoyer *Was Right*, *supra*, at 1287–1313. But the States are not "persons" for due process purposes, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966), and they cannot make use of a due process defense. So the traditional limits on jurisdiction over States might well be enforced today as they had been before, by denying recognition on common-law grounds.[3]

Even today, the courts will still refuse recognition to a determination that a State court "had no power to make." See *Thomas* v. *Wash. Gas Light Co.*, 448 U.S. 261, 282–83 (1980) (plurality opinion); accord *V.L.* v. *E.L.*, 136 S. Ct. 1017, 1020 (2016); *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222, 240–41 (1998). While the

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[3] Though this brief uses the terms interchangeably, the common law applicable to State sovereign immunity may have grown apart from the law-of-nations doctrines applicable to foreign sovereigns. Modern international practice arguably reflects a "restrictive" theory of immunity, which might permit jurisdiction over the in-state torts alleged by Hyatt, while the American practice regarding the immunity of the States and of the United States does not. Compare *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999), with Restatement (Third) of the Foreign Relations Law of the United States §451 & cmt. *a* (Am. Law. Inst. 1987); *id.* §454(1) & cmts. *a*, *d*. But the Court may ignore this issue for now. Hyatt has invoked international law to suggest that sister-state immunity is a matter of Nevada's comity and consent, not to argue that the Board lacks immunity for the type of actions alleged. See BIO 14; see also this Court's Rule 15.2.

Constitution does not stop a State from abrogating immunity doctrines internally, it also might not help the State secure recognition for the resulting judgments.

The Founders might never have specifically contemplated how recognition doctrines would protect sister-state immunity: few plaintiffs were bold enough to bring such suits, and fewer courts were willing to let them. But the Founding-era law of recognition offered a wholly adequate means of invalidating such judgments if they ever arose, and it may do the same today. In an appropriate case, the Court could address that law and revisit the relevant portions of *Hall*.

III. This case is an unsuitable vehicle for revisiting *Nevada* v. *Hall*.

This is not an appropriate case for revisiting *Hall*. A State wishing to assert the defenses described above might have a number of strategic options to avoid the specter of dueling judgments, asset seizures, and races to the courthouse described in *Hall*, 440 U.S. at 429–30 (Blackmun, J., dissenting); *id.* at 443 (Rehnquist, J., dissenting). Unfortunately, the Board's strategy—appearing in state court, litigating the case to judgment, and seeking federal-question review—may have placed it outside the protections of the common-law immunity. This case is therefore a poor vehicle for revisiting those protections.

What is more, the Board's strategy has brought this Court's subject-matter jurisdiction into question. The Court's adjudication of this case sits in violation of the plain text of the Eleventh Amendment, which limits the federal courts' judicial power, and which therefore

(unlike the immunity preserved in *Hans* and *Alden*) cannot be discarded by waiver or consent.

Because the issues cannot be resolved cleanly in this case, and especially because the Court's own subject-matter jurisdiction is in doubt, the writ should be dismissed as improvidently granted.

A. States may have effective tools for resisting sister-state judgments, but the Board cannot use them.

If a State attempts to abrogate sister-state immunity within its own courts, the defendant States have a number of tools for resisting adverse judgments. The most obvious strategy is simply to default, as Georgia did in *Chisholm*, see 2 U.S. at 419, and to resist enforcement later on. Once Hyatt filed his complaint, the Board could have ignored the summons, waited for Hyatt to try to collect elsewhere, and challenged the judgment then. See *Hall*, 440 U.S. at 429–30 (Blackmun, J., dissenting); see also Note, Nevada v. Hall: *The Death Knell of Interstate Sovereign Immunity*, 9 Cap. U. L. Rev. 113, 125 & n.78 (1979).

To avoid seizures of its assets in other States, the Board could also have filed its own action against Hyatt in federal court (including in this Court, see U.S. Const. art. III, §2, cl. 2; 28 U.S.C. §1251(b)(3) (2012)). A federal forum is not necessarily bound by Nevada's efforts to abrogate sister-state immunity in its own courts, just as *D'Arcy* was not bound by a state statute asserting an exorbitant personal jurisdiction. When the Constitution allows for federal jurisdiction without prescribing a rule of decision, it necessarily "gives power to decide according to the appropriate law of the

case," which in interstate cases will often include the "principles of the law of nations." *Rhode Island*, 37 U.S. at 737, 748. A federal forum might thus award declaratory relief to shield the interests of the defendant State.

Alternatively, California could have filed an original action against Nevada in this Court, see §1251(a), seeking a declaration of its entitlement to sister-state immunity. Again, this Court is not necessarily bound by a State's efforts to abrogate immunity in its own courts. (Indeed, Nevada might well consent to such an action, as it has joined in asking this Court to overturn *Hall*. See Br. for Indiana et al. on Pet. for Cert. 1, 11.)[4]

The Board did none of these things. It entered an appearance in the Nevada court, argued the merits, litigated the case to judgment, and eventually sought this Court's review on federal-question grounds. See Pet. for Cert. 2 (invoking 28 U.S.C. §1257 (2012)); Pet. Br. 4 (same). That was the wrong approach. Because the Nevada judgment infringed no *federal* right, this Court has no proper means by which to disturb that judgment. And because the common-law immunity concerns the State's amenability to compulsory process, the Board's appearance may have waived its ability to contest the judgment.

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[4] To the extent that an action for a purely declaratory judgment might be thought to fall afoul of the Anti-Injunction Act, 28 U.S.C. §2283 (2012), that issue can be addressed by Congress, without this Court needing to distort the constitutional law of immunity.

1. The Board has no federal right that supports disturbing the judgment under review.

Had this case arisen under another head of jurisdiction, the Court could review the Nevada judgment in full. But the Board invokes this Court's jurisdiction under §1257, apparently because a "title, right, privilege, or immunity is specially set up or claimed under the Constitution," §1257(a). This case does not involve any title or right granted by the Constitution or any other form of federal law. And the Court has long recognized that a judgment resting on "the law of nations" and "principles of general law alone" cannot support the exercise of federal-question jurisdiction. *N.Y. Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1876); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1875) ("general principles of equity jurisprudence").

Modern courts sometimes view interstate disputes like these as involving "federal common law," for which federal-question jurisdiction is sometimes available, see *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100, 103 (1972); accord Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 261. But the Founders did not. "Nothing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century." Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1274 (1985). And the relevant statutory provision addressing appellate review of state judgments refers to rights and titles granted by "the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

§1257(a). Whatever "federal common law" may be, it is not a Constitution, treaty or statute. The Court therefore lacks any basis for reversing in this case.

2. The Board's voluntary appearance has jeopardized its ability to challenge the judgment.

Even if this Court could reexamine the Nevada judgment under a different head of jurisdiction, the Board's appearance in Nevada court may have vitiated the issue.

While Eleventh Amendment immunity addresses "[t]he Judicial power of the United States," U.S. Const. amend. XI, and is traditionally understood as limiting the courts' subject-matter jurisdiction, the traditional common-law and law-of-nations immunity addressed the States' amenability to compulsory process—a topic in what we would now call personal jurisdiction, and something that can be waived. See Nelson, *supra*, at 1565. Historically, a court's lack of power to compel attendance was understood to be wholly cured by the party's voluntary appearance. See *Mayhew* v. *Thatcher*, 19 U.S. (6 Wheat.) 129, 130 (1821); *Pollard* v. *Dwight*, 8 U.S. (4 Cranch) 421, 428–29 (1808). The same doctrines were applied to questions of immunity: Iredell's *Chisholm* dissent noted that the issue had not been squarely presented in an earlier case against Maryland, "because the Attorney-General of the State voluntarily appeared," 2 U.S. at 429.

Today we still recognize that "[b]y submitting to the jurisdiction of the court," even "for the limited purpose of challenging jurisdiction," a party "agrees to abide by that court's determination on the issue of jurisdiction,"

which "will be res judicata on that issue in future proceedings." *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). Here the courts of Nevada have found jurisdiction to be present, and there is no federal-question basis on which to disturb their judgment. And under modern doctrine, once an issue of jurisdiction has been fully and fairly litigated and finally decided, the court's ruling will be conclusive on the parties. *Durfee* v. *Duke*, 375 U.S. 106, 111 (1963).[5]

As a result, the Board may well be bound to satisfy this particular judgment, even if it could successfully claim immunity in future suits.

B. The Eleventh Amendment may deprive this Court of jurisdiction.

More urgently, and somewhat ironically, this Court's own Article III jurisdiction is itself in serious question. This lawsuit was commenced in 1998 by Hyatt, then a citizen of Nevada, see J.A. in No. 02–42, p. 45, against an entity that both parties treat as the State of California.[6] As such, it is a "suit in law or equity" to which "[t]he Judicial power of the United States shall

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[5] *Durfee* suggested that sovereign immunity might present an exception to this rule, but it noted that "in neither of [the cited] cases had the jurisdictional issues actually been litigated in the first forum," 375 U.S. at 114 & n.12.

[6] For Eleventh Amendment purposes, the Court may assume that the Board stands in for the State, as the petitioner has the burden of establishing the Court's jurisdiction. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983). The Board has not claimed to be distinct from the State, and indeed its position is founded on sharing California's sovereign immunity.

not be construed to extend," U.S. Const. amend. XI—and which the federal courts, including this Court, cannot hear.

To be sure, it was the Board that brought this case to the Court on petition for certiorari. But the case was "commenced" by Hyatt, which is what matters for Eleventh Amendment purposes. As Chief Justice Marshall explained at length in *Cohens* v. *Virginia*, the party who "commenced or prosecuted" a suit is the one who initiated the proceedings, not the one who brings the case to this Court: "Whatever may be the stages of its progress, the actor is still the same." 19 U.S. (6 Wheat.) 264, 408 (1821). Otherwise, no diverse criminal defendant could ever seek certiorari review of his state conviction, for that would be prosecuting a suit against a State. See *id.* at 410–12. So if Hyatt's suit was beyond "[t]he Judicial power of the United States" when it was commenced in state court, it is also beyond this Court's appellate jurisdiction today.

Under current precedent, a State may voluntarily set aside the Amendment's limitations on "[t]he Judicial power," see *Lapides* v. *Board of Regents*, 535 U.S. 613, 616 (2002); *id.* at 619 (citing *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883); *Gunter* v. *Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)). And these limitations do not even apply to "appellate review of state-court judgments," on the theory that such review is "inherent in the constitutional plan," *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 28, 30 (1990) (citations and internal quotation marks omitted). But the cases do not address the text or history of the Amendment, which was written to

confine the power of the federal courts and which intentionally eliminated the parties' discretion.

Though the parties have not asked the Court to reconsider these doctrines, the question of jurisdiction is one this Court "is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it"—indeed, "even though the parties are prepared to concede it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (citations and internal quotation marks omitted). The Court therefore cannot proceed without deciding on its own what to make of these dubious precedents.

1. The Eleventh Amendment was enacted as a nonwaivable restriction on the judicial power of the United States.

After *Chisholm* held that States could be called to answer in federal court, some reform proposals were framed in terms of the traditional common-law immunity from suit, protecting the States from personal jurisdiction and compulsory process in a federal trial court. See, *e.g.*, *Proceedings of the U.S. House of Representatives* (Feb. 19, 1793), Gazette of the United States (Phila.), Feb. 20, 1793, *in* 5 DHSC, *supra*, at 605, 605–06. But the language that eventually became the Eleventh Amendment focused instead on subject-matter jurisdiction and the scope of "The Judicial Power" as a whole, see Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, *supra*, at 607, 607–08. There is good reason to think that this shift in the Amendment's drafting was meaningful, and

that it closed the federal courts without exceptions for waiver or appeal.

By declaring how the original Constitution was to be "construed," the Amendment "annulled all jurisdiction of such cases then pending," even if "the court had acted on [the case] for years." *Dudley's Case*, 7 F. Cas. 1150, 1151 (Baldwin, Circuit Justice, CCED Pa. 1842) (No. 4114); accord Nelson, *supra*, at 1604 & n.222. And by restricting the federal judicial power, the Amendment eliminated any argument that a State's appearance reflected consent—for "lawyers of the 1790s certainly knew of the argument that subject matter jurisdiction (unlike personal jurisdiction) could not be conferred by consent." Nelson, *supra*, at 1605; accord *id.* at 1605 n.223 (citing sources). As the Court in *Rhode Island* noted, objections to "the manner of bringing the defendant into court" are "waived by submission to the process," but "appearance does not cure the defect of judicial power." 37 U.S. at 719.

Today, it might seem odd to close the courthouse door to a State that actively desires to open it (and only to out-of-state plaintiffs). But a blanket prohibition made good sense at the time. There were a number of state-diversity suits already pending in federal courts, and in some of them the States had already entered appearances. "If the Amendment had simply protected states against being haled into court, then it might have had no impact on pending cases in which (according to [*Chisholm*]) personal jurisdiction had already attached." Nelson, *supra*, at 1604. (And restricting the Amendment to trial courts might have done little good, if this Court could review both "Law and Fact" in equity cases appealed from state courts.

U.S. Const. art. III, §2, cl. 2; cf. *id.* amend. VII.) The Amendment was designed to do more, as the Supreme Court confirmed immediately after it was declared ratified—holding that "there could not be *any jurisdiction*, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state." *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798) (emphasis added); accord *id.* at 380 (argument of counsel) (conceding its application to federal-question appeals).

"When given its most natural reading, the Eleventh Amendment creates a second type of sovereign immunity, which sounds in subject matter jurisdiction and which therefore cannot be waived"—while the traditional common-law immunity, which may apply in "situations that the Eleventh Amendment does not cover," can be waived by submitting to the trial court's jurisdiction. Nelson, *supra*, at 1566. Modern doctrine has sometimes "failed to keep the two tracks separate," *id.*—creating a doctrine with a "hybrid nature," *Wis. Dep't of Corr.* v. *Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring), in which the Amendment's precise terms are treated as a stand-in for "the original constitutional design" writ large. *Alden*, 527 U.S. at 722. But distinguishing the constitutional and common-law immunities lets us read the Eleventh Amendment's text for what it says: that it is a precise limitation on the federal judicial power, and that "suits covered by the Amendment simply cannot proceed in federal court." Nelson, *supra*, at 1615.

2. Cases permitting evasion of the Amendment deserve little deference.

Under modern doctrine, a State is "free to waive its Eleventh Amendment immunity," *Lapides*, 535 U.S. at 618, and such immunity "does not circumscribe *** appellate review," *McKesson*, 496 U.S. at 28. But the cases which established these propositions do not wrestle with the text or history, and they can make little claim to the protections of stare decisis.

To our knowledge, the earliest case to describe Eleventh Amendment immunity as waivable in federal court was *Clark* v. *Barnard*, which concerned a fund held by the city of Boston. 108 U.S. at 442.[7] The Court held that it could disregard Eleventh Amendment issues relating to the treasurer of Rhode Island, named as an additional party, because of the "voluntary appearance" of that State "in intervening as a claimant of the fund in court." *Id.* at 447. According to the Court, "[t]he immunity from suit belonging to a State *** is a personal privilege which it may waive at pleasure"—such as by intervening "in a suit, otherwise well brought," which would "be a voluntary submission to [the court's] jurisdiction." *Id.* Because Rhode Island had "appeared in the cause and presented and prosecuted a claim to the fund in controversy," it "became an actor as well as defendant," making the proceeding into "one in the nature of an interpleader." *Id.* at 448.

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[7] *Curran* v. *Arkansas*, 56 U.S. (15 How.) 304, 309 (1853), was prosecuted by an individual in state court and then appealed to this Court; but it was not an Eleventh Amendment case, as the plaintiff was a citizen of Arkansas. Tr. of Record in *Curran*, 56 U.S. 304, at 3.

Clark cited no authority for its assertion that Eleventh Amendment immunity was waivable. And it seems to have conflated the State's ability to prosecute its own claim before a federal court—which the Amendment leaves untouched—with an ability to submit to a federal lawsuit as a defendant. Cf. 3 Joseph Story, Commentaries on the Constitution of the United States §1683, at 561 (Boston, Hilliard & Gray 1833) (distinguishing the two). Nonetheless, other cases then cited *Clark*, see, *e.g.*, *Gunter*, 200 U.S. at 284, and the Court has not looked back since. See, *e.g.*, *Lapides*, 535 U.S. at 619 (citing *Clark*); *Schacht*, 524 U.S. at 389 (same).

Likewise, though *McKesson* cited "several recent cases" for the Eleventh Amendment's nonapplicability to appeals, 496 U.S. at 28 n.9, these "drive-by jurisdictional rulings" carry little force, *Steel Co.*, 523 U.S. at 91, as they failed to join issue with the Constitution's text. The Amendment unambiguously limits the judicial power in suits that continue to be "prosecuted" on appeal, as courts and parties recognized at the time. See *Cohens*, 19 U.S. at 408–09; *Hollingsworth*, 3 U.S. at 380 (argument of counsel). And this Court's "appellate Jurisdiction" only extends to "other Cases" within the "judicial Power of the United States," U.S. Const. art. III, §2, cl. 1–2; there is no "constitutional plan" for appellate review over and above the particular grants and limitations of judicial power. Compare *McKesson*, 496 U.S. at 30, with *Seminole Tribe*, 517 U.S. at 87 (Souter, J., dissenting) (describing *McKesson*'s reasoning as "specious"). If Hyatt's suit was beyond the judicial power when filed in state court, it is beyond the Court's jurisdiction now.

As the Board notes regarding *Hall*, in the field of state sovereign immunity the stare decisis factors are "at their lowest ebb"; these cases are constitutional, not statutory, and they do not address questions of primary conduct. Pet. Br. 13. If a precedent may be measured by "the quality of its reasoning," *Janus* v. *Am. Fed'n of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2479 (2018), then *Clark* and *McKesson* deserve little deference. What's more, these lines of decisions are inconsistent with the enormous bodies of precedent on the nonwaivability of subject-matter jurisdiction and the limited grounds for appellate review.

The Court's jurisdiction in this case is therefore in serious doubt. Because these issues are jurisdictional, they cannot be ignored. But they also deserve more extensive consideration than can be provided in an *amicus* brief. If the Court does not wish to order supplemental briefing on jurisdiction, it may wish to postpone its reconsideration of *Hall* for a case that presents the issues more cleanly—for example, one in which the State is the plaintiff, resisting enforcement of a default judgment under another head of jurisdiction.

For now, the Court could dismiss the writ as improvidently granted, perhaps with an explanatory opinion. See, *e.g.*, *Roper* v. *Weaver*, 550 U.S. 598 (2007) (*per curiam*). Alternatively, it should reach the jurisdictional issue and dismiss the writ for lack of jurisdiction. If satisfied of its jurisdiction, however, the Court should affirm the Nevada judgment, for lack of a federal-question basis on which to disturb it.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the writ should be dismissed for want of jurisdiction, or the judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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APPENDIX

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Constitution of the United States

Art. III, § 2, cl. 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. IV, § 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 28, United States Code

28 U.S.C. § 1257:

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.